(2)

No. 03-1200

MAY 19 2004

In The
Supreme Court of the United States

FLORA HOLLAND, WARDEN,

Petitioner,

v.

JESSIE L. JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

MICHAEL E. MOORE
Solicitor General
State of Tennessee

JENNIFER L. SMITH
Senior Counsel
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3487

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Respondent does not dispute petitioner's contention that Melissa Gooch has never testified in any evidentiary proceeding, state or federal, and that the affidavit of Melissa Gooch was not before the state court when it considered Jackson's ineffective assistance of counsel claim in state post-conviction proceedings. Rather, he contends that Warden Holland has waived consideration of her evidentiary issue by failing to raise it below. The well-documented procedural history of this case belies respondent's assertion.

The State of Tennessee has repeatedly asserted that the "statement" of Melissa Gooch could not be considered in connection with Jackson's ineffective assistance of counsel claim. In state post-conviction proceedings, the State argued that Jackson failed to meet his burden of proof in establishing prejudice from counsel's alleged deficient performance and, further, opposed Jackson's attempt to reopen the proof after the court had dismissed his post-conviction petition. The Tennessee Court of Criminal Appeals specifically held that Jackson presented no cognizable evidence, through live testimony or by affidavit, to support his ineffective assistance claim and, in fact, denied Jackson's claim, in large part, on the basis of that evidentiary deficiency. (App. 96)

In federal habeas corpus proceedings, Warden Holland argued that the state court's adjudication did not result in a decision that was contrary to or an unreasonable application of established federal law in light of the *evidence presented in the state court proceeding*. In her motion for summary judgment in the district court, Warden Holland

specifically highlighted the fact that "Melissa Gooch was never effectively produced" in state proceedings and defended the state court's refusal to allow Jackson to reopen proof in the state proceedings to enable him to present testimony of Melissa Gooch. In its order denying Jackson's habeas petition, the district court independently addressed the affidavit of Melissa Gooch (which had been provided to the district court by Jackson's counsel, though never introduced in any federal evidentiary proceeding), but correctly concluded that it could not disturb the state-court decision because that evidence had never been presented in the state proceedings. (App. 63-64)

Since there were no federal evidentiary proceedings, and the habeas petition ultimately was dismissed summarily in the warden's favor under the reasonableness standard of 28 U.S.C. §2254(d), there was no need, nor practical opportunity, for the warden to lodge a separate "objection" to the Gooch affidavit as Jackson now urges. Indeed, Jackson's "Notice of Filing Documents" (App. 104-06), the vehicle by which the affidavit at issue made its way into these federal proceedings, was of no evidentiary significance absent a hearing at which additional evidence was admitted or an order directing expansion of the record pursuant to Rule 7(a), Rules Governing Section 2254 Cases in the United States District Courts ("if the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the

merits of the petition"), neither of which occurred in this case.[1]

Prior to the Sixth Circuit's decision in this case, no court reviewing Jackson's ineffective assistance claim had *ever* considered the affidavit of Melissa Gooch as substantive evidence supporting the prejudice requirement of Jackson's claim, a fact reiterated by the warden in her principal brief in the Sixth Circuit through direct quotation of the state-court opinion declining to consider Jackson's submission (in the form of an "unsubstantiated pleading") concerning Melissa Gooch. It was unnecessary to challenge the Sixth Circuit's use of the evidence in a petition for rehearing in order to preserve the issue for review by this Court. Indeed, the Sixth Circuit Rules make clear that the filing of a petition for rehearing "is not a prerequisite to the filing of a petition for writ of certiorari." 6 Cir. R. 35(b). In short, Warden Holland has never directly raised the evidentiary issue presented in this petition, because it did not become an issue until the Sixth Circuit exceeded its evidentiary bounds to reach the result in this case. The Sixth Circuit's decision disturbs a nearly twenty-year-old first degree murder conviction based upon matters outside the evidentiary records of both the state and federal courts. This is precisely the type of outcome that AEDPA, with its highly deferential standard of review

[1] Jackson also points to Fed. R. Civ. P. 15(b), which allows amendment of the pleadings in a civil case to conform to evidence actually presented "at the trial." But this provision detracts from Jackson's argument; it does not support it. Rule 15(b) contemplates the admission of evidence, with or without objection, at an evidentiary proceeding. As discussed above, the affidavit at issue has never been introduced into evidence in any court, state or federal.

and strict evidentiary requirements, was designed to prevent and warrants certiorari review under Supreme Court Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. MOORE
Solicitor General
State of Tennessee

JENNIFER L. SMITH
Senior Counsel
Counsel of Record
Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3487